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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

No. 340813

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MICHAEL L. DARLAND and MYRNA DARLAND,  
husband and wife, et al,

Appellants,

v.

SNOQUALMIE PASS UTILITY DISTRICT, a Washington corporation,

Defendant/Cross-Appellant.

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APPELLANT DARLANDS' REPLY TO  
SNOQUALMIE PASS UTILITY DISTRICT'S  
BRIEF ON CROSS-APPEAL

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Douglas W. Nicholson, WSBA #24854  
Lathrop, Winbauer, Harrel,  
Slothower & Denison, LLP  
Attorneys for Appellants  
P.O. Box 1088/201 W. 7<sup>th</sup> Avenue  
Ellensburg WA 98926  
(509) 925-6916

## Table of Contents

	<u>Page</u>
I. REPLY ARGUMENT .....	1
A. Darland's Are Not Challenging the Validity of the Assessments .....	1
B. The Law Compels the District to Condemn the Necessary Easements and Deliver the Paid-For Water and Sewer Hook-ups to the Parcels Comprising the Darland Property .....	5
C. The District Unequivocally Represented and Promised to Darlands' Predecessors-in-Interest That it Would Deliver the Paid-For Water and Sewer Service to the Property Parcels .....	6
1. <u>The District's Admissions to the Trial Court</u> .....	6
2. <u>The District's Post-ULID Admissions to WSDOT</u> .....	9
D. Superintendent Kloss Had at Least Ostensible Authority to Bind the District in His Dealings With Third Parties .....	15
E. The District Must Condemn the Utility Easements .....	20
F. Under the Facts of This Case, The District Has the Statutory Authority to Condemn the Access Easements Necessary to Make the Paid-For 230 Water Hook-ups Available to the Darland Property, Because the "Public Use" Requirement Has Been Met .....	21
1. <u>Overview</u> .....	21
2. <u>The District's Power to Condemn Access Easements</u> .....	23
3. <u>The Requirement of "Public Use and Necessity" Has Been Met</u> .....	24

4.	<u>The District's Authorities Fail to Negate "Public Use"</u> .....	27
G.	It is the District's Obligation, at its Sole Expense, to Extend the Water and Sewer Main Lines to the Boundaries of the Property Parcels in Order to Make Water and Sewer Service "Available to" Them .....	30
1.	<u>Unless They Can Connect to the District's Water and Sewer System, the Parcels Have Received No Special Benefit</u> .....	30
2.	<u>Nothing in the Resolutions for ULID Nos. 4 and 7 Supports the District; They Actually Support Darlands</u> .....	33
3.	<u>Unless the District Runs the Paid-For Water and Sewer Service to the Boundaries of the Property Parcels, There Has Been No Increase in Their Fair Market Value; Hence, No "Special Benefit"</u> .....	35
4.	<u>The District's Reliance on a Map is Without Merit</u> .....	37
5.	<u>The District's Reliance on <i>Funk</i> is Misplaced</u> .....	38
H.	The District's Argument - That Darlands are Entitled to Recover the Money Paid to the District - is Without Merit .....	41
I.	The District's Remaining Arguments Are Baseless .....	43
1.	<u>The District Will be Unjustly Enriched if it is Allowed to Keep the Money for Undeliverable Water and Sewer Service</u> .....	43
2.	<u>The District's Reliance on the MOA is Self-Defeating</u> .....	44

3.	<u>The District's "Impossibility of Performance" Argument Misses the Mark</u> .....	46
4.	<u>The District's Arguments on the Issues of Equitable and Promissory Estoppel Are Unpersuasive</u> .....	47
II.	CONCLUSION .....	50

**Table of Authorities**

	<u>Page</u>
<i>Abel v. Diking &amp; Drainage Imp. Dist. No. 4</i> , 19 Wn.2d 356, 142 P.2d 1017 (1942) .....	11
<i>Brown v. McAnally</i> , 97 Wn.2d 360, 644 P.2d 1153 (1982) .....	13, 37, 45
<i>City of Longview v. Longview Co.</i> , 21 Wn.2d 248, 150 P.2d 395 (1944) .....	42
<i>City of Seattle v. Fender</i> , 42 Wn.2d 213, 254 P.2d 470 (1953) .....	11
<i>City of Tacoma v. Welcker</i> , 65 Wn.2d 677, 399 P.2d 330 (1965) .....	27-28
<i>Deep Water Brewing, LLC v. Fairway Resources, Ltd.</i> , 152 Wn. App. 229, 215 P.3d 999 (2009) .....	11
<i>Dickman v. Commissioner</i> , 465 US 330, 336, 104 S.Ct. 1086 (1984) .....	42
<i>Douglass v. Spokane County</i> , 115 Wn. App. 900, 64 P.3d 71 (2003) .....	5, 9, 13, 30, 34
<i>Felt v. McCarthy</i> , 78 Wn. App. 362, 898 P.2d 315 (1995) .....	46-47
<i>Finch v. Matthews</i> , 74 Wn.2d 161, 443 P.2d 833 (1968) .....	47-48
<i>Funk v. City of Duvall</i> , 126 Wn. App. 920, 109 P.3d 844 (2005) .....	38-39
<i>Grant v. Morris</i> , 7 Wn. App. 134, 137, 498 P.2d 336 (1972) .....	44
<i>Hearst Commc'ns, Inc. v. Seattle Times</i> , 154 Wn.2d 493, 115 P.2d 262 (2005) .....	11
<i>Heavens v. King County Rural Library Dist.</i> , 66 Wn.2d 558, 404 P.2d 453 (1965) .....	34-35
<i>Holmes Harbor Sewer Dist. v. Holmes Harbor Home Building, LLC</i> , 155 Wn.2d 858, 123 P.3d 823 (2005) .....	26
<i>In re City of Seattle</i> , 96 Wn.2d 616, 638 P.2d 549 (1981) .....	27-29
<i>In re City of Seattle</i> , 104 Wn.2d 621, 707 P.2d 1348 (1985) .....	27-29
<i>In re Marriage of Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999) .....	8
<i>Kiely v. Graves</i> , 173 Wn.2d 926, 271 P.3d 226 (2012) .....	42
<i>King County v. Theilman</i> , 59 Wn.2d 586, 369 P.2d 503 (1962) .....	27, 29

	<u>Page</u>
<i>Lake Arrowhead Comm'ty Club v. Looney</i> , 112 Wn.2d 288, 770 P.2d 1046 (1989) .....	11, 48
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).....	32
<i>Manufactured Hous. Cmty of Wash. v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000) .....	42
<i>McKee v. Am Home Prods. Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989) .....	46-48
<i>Monk v. Ballard</i> , 42 Wash. 35, 84 P. 397 (1906) .....	5
<i>Neilson v. Vashon School Dist.</i> , 87 Wn.2d 955, 558 P.2d 167 (1976) .....	8
<i>Port of Seattle v. Equitable Capital Group, Inc.</i> , 127 Wn.2d 202, 898 P.2d 275 .....	35
<i>Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Indus., LLC</i> , 159 Wn.2d 555, 151 P.3d 176 (2007) .....	24, 26
<i>Rekhter v. Dep't of Soc. &amp; Health Servs.</i> , 180 Wn.2d 102, 323 P.3d 1036 (2014) .....	44-46
<i>Seattle Popular Monorail Auth.</i> , 155 Wn.2d 612, 121 P.3d 1166 (2005).....	27-28
<i>Seely v. Gilbert</i> , 16 Wn.2d 611, 134 P.2d 710 (1943) .....	6
<i>Shafer v. State</i> , 83 Wn.2d 618, 521 P.2d 736 (1974) .....	32
<i>South Kitsap Family Worship Ctr v. Weir</i> , 135 Wn. App. 900, 146 P.3d 935 (2006) .....	49
<i>State ex. rel. Bain v. Clallam County Bd. of County Commissioners</i> , 77 Wn.2d 542, 463 P.2d 617 (1970) .....	20
<i>State ex. rel. Wash. State Convention &amp; Trade Ctr v. Evans</i> , 136 Wn.2d 811, 966 P.2d 1252 (1998) .....	27
<i>State v. O'Connell</i> , 83 Wn.2d 797, 523 P.2d 872 (1974) .....	20
<i>Stoddard v. King County</i> , 22 Wn.2d 868, 158 P.2d 78 (1945) .....	20
<i>Tesoro Ref. &amp; Mktg. Co. v. Revenue</i> , 164 Wn.2d 310, 189 P.3d 28 (2008) .....	32
<i>Towers v. Tacoma</i> , 151 Wash. 577, 276 P. 888 (1929) .....	5, 9, 30, 34
<i>Town of Steilacoom v. Thompson</i> , 69 Wn.2d 705, 419 P.2d 989 (1966) .....	24-26
<i>Udal v. Escrow</i> , 159 Wn.2d 903, 154 P.3d 882 (2007) .....	19
<i>Vine Street Commercial v. City of Marysville</i> , 98 Wn. App. 541, 989 P.2d 1238 (1999), <i>review denied</i> , at 141 Wn.2d 1006, 10 P.3d 1075 (2000) .....	1, 11, 13, 31, 39, 49

Page

*Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*,  
96 Wn.2d 558, 637 P.2d 647 (1981) ..... 46-47

**Rules and Statutes**

ER 201(a).....37  
ER 201(b).....37  
ER 20(d).....37  
RAP 10.3(a)(6) .....46  
RCW 8.12.030 .....24  
RCW 35.22.302 .....28  
RCW 57 .....33  
RCW 57.02.030 .....24  
RCW 57.08.005 ..... 21, 23-24  
RCW 57.08.005(1) .....12, 28  
RCW 57.08.005(3) .....23, 27  
RCW 57.08.005(5) .....23, 27  
RCW 57.08.005(6) .....27  
RCW 57.08.005(10) .....26  
RCW 57.08.005(11) ..... 26-27  
RCW 57.08.081(1) ..... 26-27  
RCW 57.16.060 .....33  
RCW 57.16.070 .....33  
RCW 57.16.090 ..... 1-2  
RCW 57.16.100 .....33  
RCW 57.16.100(1) .....1

**Other Authorities**

Restatement (Second) of Contracts, § 265 Cmt. a (1481) .....46

## I. REPLY ARGUMENT

### A. Darland's Are Not Challenging the Validity of the Assessments.

The District's entire cross-appeal is predicated upon the false premise that Darlands are challenging the validity of ULID Nos. 4 and 7, including the amount of the assessments levied thereunder. Relying upon this false premise, the District then concludes that Darlands' claims are conclusively barred under RCW 57.16.100(1), because their predecessor-in-interest [Von Holnstein] did not timely file an appeal pursuant to RCW 57.16.090.<sup>1</sup>

The fatal flaw with the District's position is that Darlands *are not* challenging the validity of the ULIDs, or the assessments levied thereunder. Instead, Darlands claim the District breached its legal and contractual obligation to make the paid-for water and sewer service "available to" their Property parcels. This obligation *did not* arise until all assessments levied against the Property for such service had been paid, which did not occur until *after* June 1, 1989. CP at 110-14, 553-54. Until then, the District had no duty to make the water and sewer service "available to" the parcels. *Vine Street Commercial v. City of Marysville*, 98 Wn. App. 541, 549-50, 989 P.2d 1238 (1999), *review denied* at 141 Wn.2d 1006, 10 P.3d 1075 (2000).

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<sup>1</sup> *Id.* RCW 57.16.100(1) states that, once the assessment roll for local improvements has been confirmed by a district, all matters relating thereto are deemed conclusive unless a timely appeal is filed. RCW 57.16.090 provides only a 10-day window for filing an appeal after publication of the notice confirming the adoption of the assessment roll.

The significance of this fact is critical. Simply put, there was no possible way for any assessed property owner to know that the District never intended to fulfill its promise to make water and sewer service available to his or her property within the 10-day deadline for filing an appeal under RCW 57.16.090. Indeed, the deadline expired in 1982 for ULID No. 4, and in 1987 for ULID No. 7. CP at 1669-71, 1717, 1722-73. To accept the District's argument, therefore, would set a dangerous precedent. It would allow any water and sewer district to make promises to induce property owners to accept their properties being assessed and brought into a ULID, without protest, and then later rescind its promises after the 10-day window to appeal had lapsed. And this is precisely what the District is doing here.

Further proof that Darlands are not collaterally attacking the validity or amount of the assessments is the fact that they, like their predecessor-in-interest, Miller Shingle, purchased the Property exclusively for development purposes, which depended upon the District delivering the guaranteed and paid-for water and sewer service to the boundaries of the four tax parcels comprising the Property. CP at 98-101, 554, 729-30, 749-84.

Indeed, Miller Shingle paid the District the total sum of at least \$492,781.37 (which included the delinquent assessments, penalties, and interest, which had caused the District to threaten Von Holnstein with foreclosure on the Property (CP at 553)); and Miller Shingle would not have done so

if it believed the assessments were not valid. CP at 98-101, 554.

Likewise, when Darlands purchased the Property from Miller Shingle for \$675,000, the purchase price included the paid-for assessments and the corresponding benefits, which Darlands paid for the sole purpose of developing the Property to fully utilize the 230 guaranteed water hook-ups and a corresponding number of sewer hook-ups. CP at 729-30, 766-768, 1559.

According to a WSDOT MAI appraisal, signed February 8, 2008, the fair market value of the Property was \$14,848,000, *but only if* the Property actually had water and sewer service available to it, which in turn required the necessary access and utility easements to serve 230 water hook-ups, with water service at 400 gpd per hook-up, and a corresponding number of sewer hook-ups. CP at 749, 767-69, 774. When the 2008 appraisal was performed, Darlands had spent additional funds to develop a commercial and residential planned unit development, known as SnoCadia, with a potential 120 residential condominium units, 112 residential single-family units, and 6.0 acres of commercial development land, in order to utilize the 230 guaranteed water hook-ups. CP at 729-80, 767. However, final approval of the development plan by Kittitas County was contingent upon the Property having the necessary 60'-wide access easements, and related utility easements. CP at 730, 767-68, 769, 778-79. Neither Miller Shingle nor Darlands would have undertaken these expenditures in anticipation of developing the Property unless

they believed the assessments for the hook-ups were valid.<sup>2</sup>

In light of the above, the proper issues on appeal are as follows:

1. Must the District, at its sole expense, exercise its power of eminent domain to condemn the utility easements necessary to extend the water and sewer mains from their present termini to the Property parcels?
2. Must the District, at its sole expense, exercise its power of eminent domain to condemn the access easements necessary for the Property parcels to utilize the paid-for 230 water and 38 sewer hook-ups?
3. Must the District, at its sole expense, extend the water and sewer mains to the boundary of the four separate tax parcels comprising the Property, with sufficient capacity to serve 230 paid-for water hook-ups at 400 gpd per hook-up?
4. In the alternative, and only if the District cannot be compelled to meet the above three conditions, should the District be required to refund to Darlands all monies paid to the District for the undeliverable water and

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<sup>2</sup> Miller Shingle, through Leclezio, also had the Property rezoned from forest and range to planned commercial zoning in anticipation of developing the property. CP at 101, 554. The Property has only a single 20'-wide access easement; thus, with or without water service from the District, under Kittitas County's road requirements, the Property is limited to two residential structures, which could be serviced with wells and septic systems. CP at 1132. Since the Property is comprised of four separate tax parcels, however, one can speculate that Darlands might be able to get a variance to develop four residential structures. Either way, they cannot proceed with their development plans without the 60'-wide access easement necessary to deliver the paid-for water and sewer hook-ups to the Property's parcels. CP at 729-30, 769, 774.

sewer service, with interest?<sup>3</sup>

**B. The Law Compels the District to Condemn the Necessary Easements and Deliver the Paid-For Water and Sewer Hook-ups to the Parcels Comprising the Darland Property.**

The law is clear that neither water nor sewer service is "available to" the Property parcels unless the District first exercises its power of eminent domain to condemn the easements necessary to extend the water and sewer lines from the existing termini of their main lines, through the intervening privately held land, to the parcels. "In order for a sewer to be susceptible of use to a given parcel of land, *there must be access from said land to said sewer without passing through the property of other individuals.*" *Towers v. Tacoma*, 151 Wash. 577, 582, 276 P. 888 (1929) (italics added) (quoting *Monk v. Ballard*, 42 Wash. 35, 42, 84 P. 397 (1906)). The same rule of law logically applies to making water service available as well.

As this Court stated in *Douglass v. Spokane County*, 115 Wn. App. 900, 909, 64 P.3d 71 (2003): "No special benefit accrues to the Douglasses' properties when the properties do not connect to any of the ULID No. U966 improvements and the sanitary flow from the Douglasses' properties does not enter any portion of the improvements." Thus, the District must exercise its eminent domain power to condemn the easements necessary to deliver the

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<sup>3</sup> Throughout this appeal, the Court should bear in mind that the District uses the words "ERU", "hook-up", and "connection" interchangeably. CP 788, 803, 806, 1068.

promised 230 water and 38 sewer hook-ups, plus physically extend the water and sewer mains to the Property parcels; otherwise, those parcels cannot connect to the ULID No. 4 and 7 improvements.

**C. The District Unequivocally Represented and Promised to Darlands' Predecessors-in-Interest That it Would Deliver the Paid-For Water and Sewer Service to the Property Parcels.**

**1. The District's Admissions to the Trial Court.**

The District admitted to the trial court that "[t]he purpose of ULID No. 7 was to install a new water transmission main and two storage tanks [that] would tie the entire Snoqualmie Pass area into one complete public water system, *and to make public water service available to all properties within the ULID.*" (CP at 1148) (italics added). This judicial admission is binding on the District. *See, e.g., Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943) (statements made by counsel in connection with a motion are binding on the client).

Moreover, in its answer to Darlands' amended complaint, the District made the following admissions:

- At paragraph 3.3 of its answer, the District "admits that the language quoted from the Minutes of the Regular Meeting of the Board of Commissioners of Snoqualmie Pass Sewer District dated January 8, 1986, *speaks for itself.*" The corresponding language from paragraph 3.3 of the amended complaint alleges: "[T]he Board needs to make a decision on whether or not this project for water will allow the District to give the lot owners prepaid water hookups. . . . The

Board discussed this in full and it was decided that ***they would grant prepaid hookups on the water as they already have them for the sewer from ULID #4.***

Superintendent Kloss then asked the Board that if the District is giving each lot owner one prepaid hookup, ***does the system have the capacity to promise them water and will it be available. The Board stated that if the pass-wide system (ULID #7) goes through there will be enough water available.*** (Emphasis added.) Compare CP at 689 and 705.

- In answering paragraph 3.4, the District "admits that the language quoted from the July 25, 1986 Memorandum from Richard G. Kloss to Snoqualmie Pass Landowners ***speaks for itself*** and that the Memorandum was distributed to certain landowners located within the District." The relevant language from paragraph 3.4 alleges: "This method of payment [of assessments] allows all land over 1 acre to be guaranteed 3 residential equivalent hookups (1,200 gpd)." (Emphasis added.) Compare CP at 689 and 705.
- At paragraph 3.5 of its answer, the District "admits that the Minutes of the Regular Meeting of the Board of Commissioners of Snoqualmie Pass Sewer District dated December 10, 1986, and the Memorandum dated July 31, 1987 from Richard G. Kloss to All Existing Homeowners ***speak for themselves.***" The relevant language of paragraph 3.5 of the amended complaint alleges: "The Board of Commissioners stated that this does not include any distribution system for water and that it only runs the water mains by the property making water available to them, this is also true for sewer. . . . ***The District will only be responsible for the water mains and the line from the main to the property line. The water service line is the responsibility of the homeowner or business.***" (Emphasis added.) Compare CP 690 and 704.
- In answering paragraph 5.3 of the amended complaint, ***the District "admits that, through the formation of***

***ULID Nos. 4 and 7, it entered into a contract with the owners of the property within those two ULIDs which conferred certain 'special benefits' to those property owners.***" (Emphasis added.) CP at 706.

- In answering paragraph 5.4 of the amended complaint, the District admits: "Darland and Darland's predecessors-in-interest have fully ***performed all obligations imposed by the District*** under #s 4 and 7, including the payment of all assessments, penalties, and interest levied pursuant thereto; therefore ***the Subject Property is entitled to receive those special benefits as represented by the District as consideration for the assessments imposed.***" (Emphasis added.) Compare CP at 696 and 706.

The District is bound by the above judicial admissions in this appeal.

"A statement of fact made by a party in his pleadings is an admission the fact exists as such and is admissible against him in favor of his adversary."

*Neilson v. Vashon School Dist.*, 87 Wn.2d 955, 958, 558 P.2d 167 (1976).

Likewise, because the District has not challenged trial court Judge Cooper's findings in his memorandum decision, which were incorporated into his summary judgment order thereon, and has instead incorporated those findings in several places in its cross-appeal, those findings are now verities on appeal.

*In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999): "Neither party disputes the trial court's findings of fact. They are thus verities on this appeal."<sup>4</sup>

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<sup>4</sup> Judge Cooper's Memorandum Decision and Order are found at CP 552-61.

Relying on Judge Cooper's Memorandum Decision, the District concedes the Darland Property is entitled to receive 38 sewer and 230 water hook-ups, with water service provided at 400 gpd per hook-up.<sup>5</sup> The District likewise admits: "The subject property was assessed . . . pursuant to ULID No. 4, **and the right to 38.37 sewer connections** was obtained by dividing the amount of the assessment by the existing connection charge."<sup>6</sup> The District's admissions contradict, and indeed refute, its following argument: "No sewer line extensions were part of the ULID."<sup>7</sup>

In short, because the District admits the ULID No. 4 assessments gave the Property "the right to 38.37 sewer connections", and 230 water hook-ups, the Property cannot connect to the District's sewer and water system unless the District extends the main line to the Property, which it is legally obligated to do to in order to make sewer and water service "available to" the Property. *Towers*, 151 Wash. at 582; *Douglass*, 115 Wn. App. at 909.

## **2. The District's Post-ULID Admissions to WSDOT.**

Long after ULID Nos. 4 and 7 were formed, on September 7, 2007, the District's counsel sent a letter to the Regional Administrator for WSDOT stating in part: "the District has a ***statutory and contractual obligation to***

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<sup>5</sup> See District's cross-appeal at 3 (citing CP at 553); *id.* at 47 (citing CP at 558-59).

<sup>6</sup> *Id.* at 3 (citing CP at 553) (emphasis added).

<sup>7</sup> *Id.*

*provide for the extension of utility service to the Darland property, and the utility easement is necessary to carry out those obligations".* CP at 1419 (emphasis added). Likewise, on March 17, 2010, the District's General Manager, Terry Lenihan, sent a letter to the Senior Assistant Attorney General, Transportation & Public Construction Division, stating in part:

Mr. Darland has submitted a plat application to Kittitas County seeking to develop the Property with up to 230 water and sewer connections. ***In order to meet its statutory and contractual obligations to deliver water and sewer service to the Property, [The District] needs a sufficient right-of-way to extend its existing water and sewer trunk lines to the Property.***

The 230 water and sewer connections sought by Mr. Darland would increase, by approximately fifty percent (50%), [the District's] total water and sewer connections, ***and the corresponding revenue to [the District] generated thereby.***

CP at 1422 (emphasis added).

The significance of the District's above admissions to another governmental agency is profound; and they should be dispositive the first three issues on appeal, as set forth at page 4 above. The District must, therefore, at its sole expense, exercise its power of eminent domain to condemn the utility easements necessary to extend the water and sewer mains to the Darland Property's four separate tax parcels, and then physically extend the water and sewer main lines to those parcels, with sufficient water capacity to serve 230 paid-for water hook-ups at 400 gpd per hook-up.

The District's above admissions provide further evidence that it prom-

ised the assessed landowners that, upon payment of their assessments, they would receive water and sewer service delivered to the boundaries of their assessed properties. Because the payment of the ULID assessments created a contact "in the usual sense of that word", *Vine Street Commercial*, 98 Wn. App. at 550, the District's post-contract conduct is relevant in determining the mutual intent of the parties in forming the contract. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 502, 115 P.2d 262 (2005).<sup>8</sup>

Moreover, payment of the ULID assessments were obligations that run with the land. *See, e.g., Abel v. Diking & Drainage Imp. Dist. No. 4*, 19 Wn.2d 356, 360-61, 142 P.2d 1017 (1943). It thus follows that the corresponding contractual benefits derived from payment of the assessments likewise run with the land. *See, e.g., Lake Arrowhead Comm'ty Club v. Looney*, 112 Wn.2d 288, 294-95, 770 P.2d 1046 (1989). This is especially so here, since the deed conveying title to the Property from Miller Shingle to Darlands expressly included "water rights [and] utilities, including [the District's] water and sewer hook-ups". CP at 1556.<sup>9</sup>

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<sup>8</sup> Further evidence of the District's intent, from the outset, to provide guaranteed water and sewer service to all assessed property owners, is that, in 1999, the District discussed whether "to rescind pre-paid hookups", because "[w]ith our current water rights we cannot honor the water hookups", and "whether alternatives might be available." CP at 1094. The potential lack of water capacity was subsequently resolved by the time Darlands sought, and obtained, a conditional permit for their development plans. CP at 1097-98.

<sup>9</sup> *See, e.g., City of Seattle v. Fender*, 42 Wn.2d 213, 218, 254 P.2d 470 (1953) and this Court's decision in *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 257-58, 215 P.3d 999 (2009) regarding covenants running with the land.

Finally, the District's above admissions - that "[t]he 230 water and sewer connections sought by Mr. Darland would increase, by approximately fifty percent (50%), [the District's] total water and sewer connections, and the corresponding revenue to [the District] generated thereby" - confirms that making water and sewer service physically available to the Darland Property satisfies the "public use" requirement to allow the District to exercise its power of eminent domain under RCW 57.08.005(1).

Despite the above, the District now asserts: "Thus, (1) the construction of a water main that began over four miles away from the Darlands' property and terminated 4,500 feet from their property, and (2) a sewer line that extended 2,200 feet from Darlands' property clearly conferred a 'special benefit' by creating more feasible access to public water and sewer which previously did not exist."<sup>10</sup>

The District's assertion is inherently self-defeating. Because the water main terminates 4,500' away from the property, and the sewer main terminates 2,200' away from the property, with privately held land lying in between, one must rhetorically ask: "What was the 'special benefit' conferred upon the Property in exchange for paying in full the assessments levied under ULID Nos. 4 and 7?" The District's answer to this question - "the special

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<sup>10</sup> See District's cross-appeal at 19 (underscoring added).

benefit each property acquired was feasible access to a public water and sewer system" - is facially absurd and contrary to law. *See Vine Street Commercial*, 98 Wn. App. at 449-50; *Towers*, 151 Wash. at 582; *Douglass*, 115 Wn. App. at 909. Darlands do not have "feasible access" to the District's water and sewer system, because they have no legal authority to condemn the easements necessary to access the system. Only the District has such authority, which it has failed to exercise.<sup>11</sup>

Given the above facts and legal authorities, the District's following arguments do not hold water:

- It "has no duty to extend the existing water and sewer mains to Darland's property under ULID Nos. 4 and 7."<sup>12</sup>
- "It is, and always has been, the property owner's responsibility to acquire the necessary easements to extend the water and sewer lines to the parcels."<sup>13</sup>
- "The District did make water and sewer connections available to all property owners within the ULID at the same rate."<sup>14</sup>
- "Water and sewer connections are available to all those who are assessed under the ULIDs."<sup>15</sup>

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<sup>11</sup> Because the Property has a 20'-wide access easement, which was obtained by Von Holnstein in 1986 (CP at 915), the Property is not landlocked, thus precluding Darlands from obtaining a private way of necessity sufficient to proceed to develop the Property. *See Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982) The District incorrectly asserts the Property is "landlocked." *See* District's cross-appeal at 1, 9, 11 and 36.

<sup>12</sup> *See* District's cross-appeal at 19.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.* at 44-45 (underscoring original).

<sup>15</sup> *Id.* at 36.

- "Prior to ULID No. 7, Darland's property had no feasible access to any public water system. Without the construction of the water transmission main, Darland's property (and other properties located in ULID No. 7) was limited to obtaining water by a private well."<sup>16</sup>
- "Similarly, ULID no. 4 made access to a public water sewer system feasible for those properties located within the boundaries of the ULID - as opposed to being dependent upon a private septic system."<sup>17</sup>
- "[I]t has always been the obligation of an individual property owner to construct whatever service or distribution lines are needed to deliver water and sewer service from the District's main line to each separate property or undeveloped tract of property."<sup>18</sup>

Regarding the last bullet point above, the District obfuscates the distinction between its main utility lines (or trunk lines) and the distribution lines, which only extend the utility service from the District's main lines internally within the boundaries of the subject properties. The District itself acknowledged this distinction on several occasions. *See, e.g.*, the pre-ULID No. 7 representations of the District's then secretary and commissioner, DeBruler: "These are guaranteed hook-ups. We are guaranteeing you water. This ULID #7 is bringing water *in trunk lines* past your property." CP at 167 (*italics added*). The District's then-Superintendent, Mr. Kloss, also made

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<sup>16</sup> *Id.* at 19. Darlands' Property parcels still have no feasible access to the District's water system, and are thus limited to obtaining water by a private well.

<sup>17</sup> *Id.* Darlands' Property parcels must still utilize private septic systems.

<sup>18</sup> *Id.* at 17. Because intervening property is privately owned, the District alone has the authority to condemn the easements necessary to extend the main lines to the Property.

clear: "It is the responsibility of the Utility District to deliver utilities to the boundary of the assessed properties." CP at 167.<sup>19</sup>

**D. Superintendent Kloss Had at Least Ostensible Authority to Bind the District in His Dealings With Third Parties.**

The District argues that it can only act through its Board of Commissioners; therefore, Kloss lacked authority to bind the District when he represented to Miller Shingle, through Leclezio, that the 230 water and 38 sewer hook-ups were guaranteed, and that the District would, at its expense, extend the water and sewer lines to the boundary of each separate parcel of property within the District, all of which induced Miller Shingle to purchase the Property from Von Holnstein, and pay at least \$492,781.37 in overdue assessments, penalties and interest for the "special benefits" promised by the District. CP at 99-100, 239-43, 563-64, 1129.

As the District's Superintendent, however, Kloss had the legal authority to make such representations, which are legally binding on the District. Indeed, Kloss, acting with full authority and knowledge of the District's Board, regularly spoke on behalf of the District at its public hearings; he also sent letters to property owners within the District. *See, e.g.*, CP at 100-101,

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<sup>19</sup> *See also*, CP at 159 ("The Board of Commissioners stated that this does not include any distribution system for water and that it only runs the water mains by the property making water available to them, this is also true for sewer."); Kloss letter at CP 169; Kloss testimony, CP at 1067, 1073-76, 1078-79; Leclezio decl., CP at 100-101.

149, 159, 169, 171, 240, 242, 253, 527, 533, 535, 537, 786, 800, 803, 1067-68, 1071-76, 1078-83, 1088-92, 1094, 1724, 1726.

Moreover, in adopting Resolution No. 87-5 for ULID No. 7, and Resolution No. 81-3 for ULID No. 4, the District expressly stated: "The proceeds from the sale of the foregoing bonds shall be used for the sole purpose of paying the costs of carrying out the improvement . . . and the District, through its proper officials and agents, shall proceed with the making of those improvements." (CP at 1696, 1783) (underscoring added)). Kloss, who was the District's Superintendent and General Manager from 1980 to July 2000, and who was responsible for the District's day-to-day operations, was its authorized official and/or agent for such purposes. CP at 240-243.

Although the District's Board of Commissioners sets the District's policies and procedures through its resolutions, the day-to-day management of the District in implementing its policies and procedures is carried out by Kloss. CP at 240, 242. And Kloss' efforts to assist Miller Shingle in obtaining the 60'-wide access easement, to allow the Property parcels to utilize the guaranteed 230 water and 38 sewer hook-ups, were clearly within the scope of his authority.

The District knew, *before* forming ULID No. 7, that Miller Shingle's predecessor, Von Holnstein, needed the 60'-wide access easement to enjoy the "special benefit" of the ULID's assessments, as his existing 20'-wide

easement was insufficient for this purpose. CP at 173, 1072-73. The District even discussed easement possibilities *before* bringing the Property into the ULID. CP at 173. The District also knew that it needed to bring the Property into the ULID in order to obtain the bonds to finance ULID No. 7, just like it needed the Property to obtain the bonds for financing ULID No. 4; and this is why the District would not let Von Holnstein opt out of the ULID. CP at 136, 157, 166-67, 515-16, 536-37, 1079, 1136-39, 1428-30.

In other words, without bringing Von Holnstein's property into ULID Nos. 4 and 7, those ULIDs could not have gone forward. Indeed, the assessments levied against the Property were the second highest among all properties under the ULIDs, as represented by the District to the bonding companies in obtaining financing for the ULIDs. CP at 1138; *see also*, CP at 529, 537. In fact, the District discussed whether property owners who had "no water line in the proximity of the property" should be assessed a lesser amount:

To extend the water main the additional distance ***would not benefit the District or them.*** [Kloss] suggested reducing the assessment by a percentage for the property owner whose property does not run adjacent to the mains, however, this will increase the assessment. ***Dave Moffat stated that it would be cost effective to put in the additional line rather than drop them from the ULID.*** Comm. Smith asked how much of an increase it would take to run the line all the way across Coal Creek to Hunter's ***and Von Holnstein's.*** Supt. Kloss stated it would be hard to get a hydraulic permit to go under Coal Creek. We are at \$700,000 and the grant is for \$743,000. Comm. Smith stated he would confer with Group Four, Inc. for an estimate.

CP at 537 (emphasis and underscoring added).

The District thus clearly knew, prior to forming ULID No. 7, that *there would be no special benefit to Von Holnstein or the District, by bringing Von Holnstein's property within ULID No. 7, unless the water mains were brought to the Property, which it intended to do at the time.* CP at 537.

The above facts confirm Kloss had the authority to assist Miller Shingle in obtaining the access and utility easements necessary to provide the Property with the 230 paid-for water hook-ups. Certainly, when Kloss obtained the quit claim deeds from Kerlake, McBride, and WSDOT, they must have believed Kloss was acting within the scope of his authority; otherwise, they would not have executed the quit claim deeds, which, unfortunately later proved to be legally defective and had to be quit claimed back to the grantors (except for the quit claim deed from WSDOT, which expired on its own terms because the District failed to construct a road over the easement on or before September 1, 2004). CP at 997-1004, 1451-52.

Moreover, WSDOT's Terry Meara, who was its South Central Regional Manager during the 1990s (CP at 1339-40), and who was subsequently promoted to Supervisor of Acquisition and Title around 1998 (CP at 1340), testified that, in connection with the quit claim deed issued by WSDOT to the District, he believed that Kloss was acting within the scope of his authority to

bind the District. CP at 1454-56. Meara, along with Leclezio, Kerslake, and others even met with Kloss at the District's office, to discuss "the establishment of a roadway" to the Property. CP at 1453-54; *see also*, CP at 1451 (the District and WSDOT were the only parties to the quit claim deed); CP at 1025-26, 1451-52 (it was the District's obligation to obtain the access easement and build the road within the 10-year window before the September 1, 2004 deadline for doing so expired); CP at 1459 (to Meara's knowledge, the District never approached WSDOT to obtain a utility easement through the WSDOT property to run the utility lines to the Darland Property).<sup>20</sup>

At a minimum, Kloss had apparent or ostensible authority to bind the District on all matters relevant to this appeal. "An agent has apparent authority when a third party reasonably believes the agent has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Udal v. Escrow*, 159 Wn.2d 903, 913, 154 P.3d 882 (2007). Kloss' above acts are certainly traceable to the District's manifestations that it guaranteed 230 water and 38 sewer hook-ups to the Darland Property, and that there would be no benefit to the Property (or the District for that matter), un-

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<sup>20</sup> *See also*, CP at 774. Miller Shingle, through Leclezio, subsequently attempted to fulfill the District's obligation under the WSDOT conditional quit claim deed only after the District was informed that the County decided, in 1997, that it would not accept the obligation of maintaining the roads. CP at 1023-24. The District, however, refused to assist Miller Shingle in this project, thus causing it to fail and the deed revert back to the state. CP at 1023-26, 1453-58.

less the trunk lines were extended to the Property's four tax parcels. CP at 98-101, 1148, 1419, 1442; *see also*, facts cited in §C *supra*.

The Washington Supreme Court has "expressly held that the doctrine of apparent authority may be invoked against a municipal corporation where it exercises a proprietary function, [and has] also recognized that the equitable principles of estoppel and implied contract, in both of which 'apparent authority' plays a part, may apply, even where the function being performed is governmental, provided the particular contract is not ultra vires." *State v. O'Connell*, 83 Wn.2d 797, 834-35, 523 P.2d 872 (1974).<sup>21</sup>

**E. The District Must Condemn the Utility Easements.**

The District admits it has the power of eminent domain to condemn the utility easements necessary to extend the water and sewer main lines to the boundaries of the Darland Property parcels. *See* District's cross-appeal at 30; *see also*, facts and citations to the record in §B *supra*.

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<sup>21</sup> The District's reliance on *Stoddard v. King County*, 22 Wn.2d 868, 158 P.2d 78 (1945) and *State ex. rel. Bain v. Clallam County Bd. of County Commissioners*, 77 Wn.2d 542, 463 P.2d 617 (1970) is misplaced. *Stoddard* addressed the issue of whether the actions of a county commissioner, in violation of a resolution that only authorized "the employment of the plaintiff as an architect in preparation of plans and specifications for the work," bound the County for additional work beyond the scope of the resolution. *Stoddard* at 869-70 (*italics original*). The Court found that one commissioner could not bind the County to more than what was authorized in the specific resolution. *Id.* at 882. In *Bain*, the County had the legal right to reject an alleged oral contract granting a pay increase under a collective bargaining agreement, which was not authorized by statute and would have been illegal to enforce. *Bain*, at 544-49. *Stoddard* and *Bain* are clearly inapposite.

**F. Under the Facts of This Case, The District Has the Statutory Authority to Condemn the Access Easements Necessary to Make the Paid-For 230 Water Hook-ups Available to the Darland Property, Because the "Public Use" Requirement Has Been Met.**

**1. Overview.**

The District argues that RCW 57.8.005 does not grant it the statutory authority to condemn land for access in this case, because condemning such access would be for Darlands' private use, thus the "public use" element is missing for eminent domain purposes. The District also argues that the Attorney General's Opinion, cited in Darlands' opening brief, does not support a contrary interpretation of RCW 57.08.005, because condemning the access easements is not necessary for its purposes under the statute. The District's arguments are without merit, for the following reasons:

1. The District brought the Property parcels into ULID Nos. 4 and 7, and assessed them for 230 water and 38 sewer hook-ups. CP at 553.

2. In doing so, the District represented *that the water hook-ups were guaranteed*, and that the District *would be extending the water and sewer mains to the boundary of all assessed parcels to those owners who paid their assessments*. CP at 100-101, 167, 240-43.

3. The District's resolutions, adopting the assessment rolls for ULID Nos. 4 and 7, state that the properties brought within the ULID were

for the District's purposes, and that each property was specially benefited by the assessments levied against it. CP at 130, 137.

4. The District represented that ULID No. 7 was being formed to create a "pass-wide" water delivery system. CP at 1729, 1742; *see also*, CP at 147, 151, 157, 159, 169, 173.

5. The District represented to the bondholders that ULID No. 7 "Provides a reliable interconnected water source, which will make water available to potential development property in the area." CP at 1137.

6. The District represented to the ULID No. 7 bond holders that the properties brought into the ULID would be for the District's purposes. CP at 1136-39.

7. In its 1987 "Official Statement Relating to Its Water and Sewer Revenue Bonds", the District represented: "The Bonds are payable solely out of the Net Revenues of the System . . . and assessments collected from any [ULID]." CP at 1428.

8. Without the assessments levied against the Property, which was the second highest assessed property in the ULIDs, the District could not have formed the ULIDs. CP at 157, 1136-39, 1428-32, 1695-97.

9. The revenue from the development of the Property, including service connection charges and related utility fees would benefit the District. CP at 1428, 1699-1713.

10. Without the County-required 60' -wide access easements, at least one of which was required at the time the District formed the ULID, which was known to the District when it incorporated the Property parcels into the ULID, there is no legal way for the Property to make beneficial use of the 230 paid-for water hook-ups. CP at 173, 769, 1775-76.

11. The law is clear that, although condemning the required access easements will benefit Darland as a private developer, as long as there is sufficient benefit to the District, which there is in this case, the "public use" requirement has been met. (*See* discussion below.)

## **2. The District's Power to Condemn Access Easements.**

In deciding this issue, it is important to bear in mind that *nothing* in RCW 57.08.005 supports the proposition that the District does not have the power of eminent domain to condemn access easements under the unique facts of this case. Indeed, RCW 57.08.005(3) and (5) authorize the District to exercise its power of eminent domain "for all uses and purposes public and private." As the District itself acknowledges, the limitation is that the District's exercise of its power of eminent domain must be "necessary for its purposes", which is the standard set forth in the statute. And the above facts satisfy this criterion. In the District's own words: "The 230 water and sewer connections sought by Mr. Darland would increase, by approximately fifty percent (50%) SPUD's total water and sewer connections, and the corre-

sponding revenue to SPUD generated thereby." CP at 1422.

RCW 57.08.005 states the District "shall have" the power to condemn "all lands, property and property rights . . . necessary for its purposes . . . [which] shall be exercised in the same manner and by the same procedure as provided for cities and town . . . ." RCW 8.12.030 empowers every city and town to condemn land for water and sewer systems, "**and for any other public use.**" (Emphasis added.) RCW 57.02.030 mandates: "The rule of strict construction *shall not* apply to this statute, which *shall be liberally construed* to carry out its purposes and objects." (Italics added.) The District thus has broad authority to condemn all lands "necessary for its purposes."

### 3. **The Requirement of "Public Use" Has Been Met.**

Regarding the "public use" requirement, the fact that Darlands will enjoy a private benefit is of no consequence, as long as the District enjoys a significant public benefit as well. "Washington courts have repeatedly held that condemnation of private property by public utilities . . . is a public use . . . . In addition, we have expressly held that a finding of public use is not defeated where alleged private use is incidental to the public use." *Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 573, 151 P.3d 176 (2007); *see also, Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966).

In *Steilacoom*, the City entered into a contract with Bridgeport Es-

tates, a corporation that was developing a large tract of land for residential purposes outside the city limits of Steilacoom. *Steilacoom*, 69 Wn.2d at 706.

Bridgeport sought to put all of the houses in its development on sanitary sewers, instead of individual septic tanks; it thus offered to construct a sewer extension connecting its sewer system to Steilacoom's sewer system. *Id.* Accordingly, Steilacoom, pursuant to its contract with Bridgeport and an appropriate ordinance, brought an eminent domain action to condemn and acquire a right-of-way easement through defendant Thompson's property, who challenged the project's public use and necessity. *Id.* at 707. Our state Supreme Court stated the issue before it as follows:

This case turns on a single question: Was the town, in making this contract with a private builder, engaging in a project of public benefit and necessity, or was it essentially conferring its powers of eminent domain upon and for the personal gain of a private builder?

*Id.* at 708.

In dismissing Thompson's petition, and allowing the trial court to proceed with the condemnation proceeding (*id.* at 712), the *Steilacoom* Court stated: "Sanitary sewers and sewage treatment facilities are, by their very nature, both public necessities and conveniences." *Id.* at 709. "That a private developer stands to derive a direct benefit from the sewer extension does not change the public character of this sewer project nor deprive it of its essence as one for public benefit and convenience." *Id.* at 710.

*Steilacoom*, like *Public Utility Dist. No. 2 of Grant County*, makes clear that, even though Darlands, as a private developer, stand to derive a direct benefit from the District extending the water and sewer mains to their Property parcels, "such extension does not change the public character of [doing so] nor deprive it of its essence as one for public benefit and convenience." *Steilacoom*, 69 Wn.2d at 710; *see also*, *Public Utility Dist. No. 2 of Grant County*, 159 Wn.2d at 573.

Likewise, the Court in *Holmes Harbor Sewer Dist. v. Holmes Harbor Home Building, LLC*, 155 Wn.2d 858, 123 P.3d 823 (2005) stated: "We read RCW 57.08.005(10) to require more service than a tentative opportunity to connect. This construction is consistent with the requirement in RCW 57.08.081(1) that some level of service be furnished." *Id.* at 865.<sup>22</sup>

The above authorities stand for the following two propositions in this case: (1) because the assessments were paid in full, the Darland Property parcels are entitled to physically connect to the District's water and sewer mains, in order to be specially benefited by the assessments; and (2) once the Darland Property is developed, and thus able to utilize the paid-for 230 water

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<sup>22</sup> When *Holmes Harbor* was decided, RCW 57.08.005(10) "authorize[d] districts `to fix rates and charges for water, sewer, and drain service supplied.'" *Id.* at 864. This authority is now found in RCW 57.08.005(11). RCW 57.08.081(1), which has not been subsequently changed, provides that "the commissioners of any district shall provide for revenues by fixing rates and charges for furnishing sewer and drainage service and facilities to those to whom *service is available*". (Italics added.)

hook-ups, the District will be benefited by the revenue generated from such hook-ups. The District itself admits this fact. CP at 1419, 1422; *see also*, CP at 1699-1713; RCW 57.08.005(3), (5), (6), (11), and RCW 57.08.081(1) (authorizing the District to establish rates for water and sewer service).

**4. The District's Authorities Fail to Negate "Public Use."**

Regarding the "public use" requirement, the District cites the following inapposite cases to support its argument: *State ex. rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 966 P.2d 1252 (1998); *Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *In re City of Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981); *In re City of Seattle*, 104 Wn.2d 621, 707 P.2d 1348 (1985); *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965); and *King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962). *Evans*, however, actually supports Darlands' position that "public use" exists in this case. *See Evans*, 136 Wn.2d at 822 ("where the private purpose is simply an incident, and the public use principal, then the incident will not destroy or defeat the principal"). Here, the District's principal purpose in bringing properties into the ULIDs, and assessing them, was to finance the ULIDs, and generate future revenue from the assessed hook-ups, all of which benefits the entire District. *See facts and citations to the record*

in §§C and F *supra*.

The District's citations to *Welcker* and *In re Condemnation Petition of Seattle Monorail Authority* fail to support its argument, because the pages the District cites from these cases merely stand for the proposition that a municipal corporation derives its power of eminent domain by statute, which "is not to be construed so strictly as to defeat the evident purpose of the grant." *Welcker*, 65 Wn.2d at 683; *Seattle Popular Monorail Authority*, 155 Wn.2d at 622. For the reasons already stated, the District's exercise of its power of eminent domain in this case is necessary for its purpose under RCW 57.08.005(1).

The two *In re City of Seattle* cases also fail to support the District's position. In *In re City of Seattle*, 96 Wn.2d 616, the Court held that the City had "no statutory authority to establish or condemn property for an urban 'focal point', or an urban shopping center, or facilities to be leased for private use as retail establishments," because the Legislature, in enacting RCW 35.22.302, "has not authorized a city to acquire property for the purpose of leasing it for uses such as these." *Id.* at 633-34. The Court went on to state: "Were these private uses only incidental to the public uses for which the land is condemned, a different question would be presented. . . . However well intended the project may be, it is obvious that an essential part of it was not authorized by the legislature." *Id.* at 634. The case, therefore, is of no use to

this Court in deciding the "public use" issue presented here.

In *In re City of Seattle*, 104 Wn.2d 621, the Court addressed the issue of whether the City's "condemnation of property for public park purposes is such an integral and inseparable part of a private development as to not be a public use within the meaning of . . . the Washington State Constitution." *Id.* at 623. The Court noted: "The Legislature has specifically granted to cities the authority to acquire property by condemnation for public parks." *Id.* at 624. The Court found that, unlike in *In re City of Seattle*, 96 Wn.2d 616, "[t]he constitutional infirmities we found in [that case] are absent in this condemnation proceeding." *Id.* at 624. Thus a public use existed. *Id.* at 625.

In *Theilman*, the County sought to condemn a right-of-way that served only to benefit the interests of a private developer, under facts which the Court described as "bizarre if not unique." *Theilman*, 59 Wn.2d at 595. In finding no public use, the Court stated: "The ultimate effect is to allow a neighboring land developer to take private property for private use. *This action is the county's in name only.* It had no funds budgeted either to acquire realtor's land or to build the road across it." *Id.* at 596 (italics added).

To conclude, each case relied upon by the District is inapposite. The District received a substantial public benefit by assessing the Property parcels under ULID Nos. 4 and 7; hence, the "public use" requirement has been met. *See* facts and citations to the record in §§C and F *supra*.

**G. It is the District's Obligation, at its Sole Expense, to Extend the Water and Sewer Main Lines to the Boundaries of the Property Parcels in Order to Make Water and Sewer Service "Available to" Them.**

**1. Unless They Can Connect to the District's Water and Sewer System, the Parcels Have Received No Special Benefit.**

The District's position - that it has no obligation at all to run the sewer and water main lines to the Property parcels, let alone pay for doing so - rests upon arguments that are not supported by the facts and untenable as a matter of law. Once the ULID assessments were paid in full, the District admits it had a legal and contractual obligation to make water and sewer service "available to" the Property parcels. *See, e.g.*, CP at 1419, 1424. This means the parcels must be physically able to connect to the District's water and sewer system, which can never happen unless the District condemns the necessary easements, and then extends the main lines to the parcels. *See Towers*, 151 Wash. at 583; *Douglass*, 115 Wn. App. at 909-10.

Indeed, unless the District condemns the easements over the privately held land lying between the termini of its water and sewer mains and the boundaries of the Property parcels, and then physically extends the water and sewer service lines to those parcels, they will not enjoy the same "special benefit" as the other parcels in the ULIDs, all of which were assessed equally. CP at 569-60; *see also*, facts, citations to the record, and authorities cited in §§B, C and F *supra*.

In other words, the District cannot induce payment of the assessments, by promising it will extend the utility service to the boundary of each assessed parcel, then later renege on its promise. As stated in *Vine Street Commercial*: "What a municipality cannot do in the formation of a ULID it also cannot do after the facts - it cannot, without paying compensation, retroactively impose conditions that effectively deprive the property owners of the special benefits for which they have become obligated by assessments against the properties, after those assessments are paid in full." *Vine Street Commercial*, 98 Wn. App. at 553. Yet this is what the District has done here.

Despite its contrary representations and premises, the District raises the following argument: "Nothing in the Resolutions creating ULID Nos. 4 and 7 states that the water and sewer trunk lines will be brought to the property lines of landlocked parcels such as this subject property."<sup>23</sup> The argument is without merit. The District is in essence saying that, in order to induce the property owners to adopt the ULIDs, it can lie to them without recourse, as long as the District's formal resolutions adopting the ULIDs do not incorporate the promises and representations it made to the property owners prior to adopting the resolutions. Fortunately, the law will not allow this.

"A government agency may not repudiate one of its own regulatory

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<sup>23</sup> See District's cross-appeal at 35-36. The Property is not "landlocked." CP at 915.

interpretations after a third party has relied upon it to their detriment." *Tesoro Ref. & Mktg. Co. v. Revenue*, 164 Wn.2d 310, 323, 189 P.3d 28 (2008); *accord, Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) ("Equitable estoppel is based on the notion that a party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon."); *Shafer v. State*, 83 Wn.2d 618, 624, 521 P.2d 736 (1974) ("The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to its detriment in reliance on that commitment, the official should not be permitted to revoke that commitment.")

The above aside, the District fails to cite to any portion of the record showing that the District's internal resolutions adopting ULID Nos. 4 and 7 were ever provided to the affected property owners. In other words, there is nothing in the record establishing that Darlands, or any of their predecessors-in-interest, had any prior knowledge of the language of the District's resolu-

tions adopting ULID Nos. 4 and 7.<sup>24</sup>

**2. Nothing in the Resolutions for ULID Nos. 4 and 7 Supports the District; They Actually Support Darlands.**

Even though the District's resolutions do not expressly state the District will extend water and sewer service to the boundaries of the assessed properties, there is likewise nothing stating the District is not obligated to do so. In other words, the resolutions are silent on this issue. *See* the District's resolution confirming the assessment roll for ULID No. 4 (CP at 129-139) and its resolution confirming the assessment roll for ULID No. 7 (CP at 136-139). In fact, the language of both resolutions actually supports finding the District *is required* to extend the utility lines to each assessed parcel once the assessments have been paid. For example, Resolution 82-3 for ULID No. 4 states, in part:

Each of the lots, tracts, parcels of land and other property shown on the assessment roll is declared to be *specialy benefited* by the proposed improvement in at least the amount charged against the same and it is further declared that the assessment appearing against the same are in proportion to the several assessments appearing on such roll. There is levied and assessed against each lot, tract, parcel of land and other property appearing on such roll the amount finally charged against the same thereon. . . . *[All future connections* within [ULID No. 4] will be subject to a connection charge or ready-

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<sup>24</sup> Darland's counsel found such evidence in the record, and there appears to be no legal authority compelling the District to make such disclosure. *See, e.g.*, Title 57 RCW in general; *see also*, specifically, RCW 57.16.060 and .070 (respectively governing ULID resolutions and hearings on the assessment roll); RCW 57.16.100 (governing the conclusiveness of the assessment roll).

to-serve fee of \$1,275.00 each, but the property owner will be entitled to a credit of one such connection charge for each \$1,275.00 of assessment against that property up to the full amount of that assessment for residential property . . . .

CP at 130 (emphasis added).

The above-quoted language contemplates that the "special benefit" the assessed property owners will receive, upon payment of their assessments, is the ability to connect to the District's sewer system. And this cannot be done unless and until the sewer mains are extended to the boundary of each assessed parcel whose owners have paid their assessments. *Towers*, 151 Wash. at 582; *Douglass*, 115 Wn. App. at 909.

As the District must concede, the "special benefit", as contemplated by ULID Nos. 4 and 7, is the increase in fair market value of the properties from having water and sewer service made available to them. In the District's own words: "The appropriate inquiry for the Court is whether the ULID improvements specially benefited the properties located within ULID nos. 4 and 7 by appropriately increasing the market value of those properties."<sup>25</sup>

As stated in *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 404 P.2d 453 (1965), "the amount of the special benefits attaching to the property by reason of the local improvement is the difference between the fair

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<sup>25</sup> See District's cross-appeal at 18.

market value of the property immediately after the special benefits have attached and its fair market value before they have attached." *Id.* at 564.

**3. Unless the District Runs the Paid-For Water and Sewer Service to the Boundaries of the Property Parcels, There Has Been No Increase in Their Fair Market Value; Hence, No "Special Benefit."**

"The 'fair market value' is 'the amount of money which a well-informed purchaser, willing but not obliged to buy the property would pay, and which a well-informed seller, willing but not obliged to sell it would accept, taking into consideration all uses to which the property has adapted and might in reason be applied.'" *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 221, n. 26, 898 P.2d 275 (1995) (quoting *State v. Wilson*, 6 Wn. App. 443, 447, 493 P.2d 1252 (1972)). This Court can, without hesitation, conclude that an informed buyer, who had knowledge that the District would never condemn the easements necessary to make water and sewer service available to the Property parcels, let alone extend the water and sewer main lines the several thousand feet needed to reach the parcels, would pay no more to purchase the Property than the buyer would pay without the Property having been assessed for such water and sewer service.

Further supporting this conclusion is what each successive owner of the Property paid to purchase it. Von Holstein paid Boise Cascade \$100,000 in 1977, after the Property had already been assessed for the sewer system

under a prior ULID. CP at 1073, 1547. Approximately 12 years later, in 1989, Miller Shingle paid Von Holnstein \$120,000 for the Property (CP at 1554), which was years after it had been assessed for sewer service under ULID No. 4 (in 1982) and for water service under ULID No. 7 (in 1987) (CP at 553).

This evidence supports a finding that the assessments levied under ULID Nos. 4 and 7 *did not* increase the fair market value of the Property; instead, the most reasonable conclusion is that the \$20,000 increase in the purchase price, between 1977 and 1989, is attributable to the natural increase in the value of land that occurs over time, rather than as a result of being brought into ULID Nos. 4 and 7. Further supporting this conclusion are the following facts: When Miller Shingle purchased the Property, the termini of the sewer and water mains were, respectively, 4,500' and 2,200' from the boundary of the Property parcels, with the intervening land held in private ownership (CP at 554); and Miller Shingle had no feasible way to connect to

the District's water and sewer system on its own. *Brown*, 97 Wn.2d at 370.<sup>26</sup>

**4. The District's Reliance on a Map is Without Merit.**

The District's argument - that during the public hearings on the formation of ULID No. 7, "[t]here was a map showing the proposed route of the new water main that ended 4,500 feet from the Subject Property" - is a red herring. To begin with, the attendees at the public hearing to approve the assessment roll, *did not* include Von Holnstein, or his representative, Conifer Northwest. CP at 446-63. *And nothing in the minutes of that public hearing makes any reference to the alleged map.* CP at 446-63; *see also*, CP at 459-60 (identifying Conifer Northwest's letter on behalf of Von Holnstein, which the District read into the record at the public hearing, stating Von Holnstein's objections to having his property included and assessed under ULID No. 7, because it lacked a 60'-wide access easement for his proposed 99-lot development); *see also*, CP at 1718 (Von Holnstein's letter to the District stating he did not want his property included in ULID No. 7); CP at 173

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<sup>26</sup> After paying Von Holnstein \$120,000 for the Property, Miller Shingle paid the District \$492,781.37 in delinquent assessments, penalties, and interest for ULID Nos. 4 and 7. CP at 554. Miller Shingle thus had a total of \$612,781.37 invested in the Property when it sold the Property to Darland in 2003, for \$675,000 (CP at 1371). Miller Shingle's profit on the sale to Darlands (\$62,218.69), 14 years after it purchased the Property, is readily attributable to the substantial increase in Upper Kittitas County land values that occurred during the early to mid-2000s, including the development of what is now the Suncadia Resort, as opposed to the ULID water and sewer assessments. This increase in Upper Kittitas County land values is such a commonly known fact that this Court can take judicial notice of it, pursuant to ER 201(a)(b), and Darlands' request that the Court take such judicial notice, pursuant to ER 201(d).

(The District stated: "Mr. Von Holnstein wants out of [ULID No. 7] because he has no legal access. . . . Easement possibilities were discussed by the Board and it was suggested that a response to Mr. Von Holnstein be made as soon as possible.")<sup>27</sup>

Moreover, the District has no answer for the following rhetorical question: How would any affected landowners who were not present at the public hearing be aware of the map? The obvious answer is that they would not, unless the District provided each landowner with a copy of the map and an explanation of what it purported to depict. And there is no evidence in the record that the District did this. *The District's failure in this regard is especially significant regarding Von Holnstein, who was a German citizen residing in that country at the time.* CP at 1085-86; *see also*, CP at 166.

**5. The District's Reliance on *Funk* is Misplaced.**

In *Funk v. City of Duvall*, 126 Wn. App. 920, 109 P.3d 844 (2005), the landowners paid the assessments to connect to the City's sewage treatment system, but decided not to connect their properties to the sewer until years later, at which time they were unable to obtain a commitment for sewer ser-

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<sup>27</sup> This evidence flatly refutes the District's mischaracterization that Von Holnstein "did not ask to opt out" of ULID No. 7. *See* District's cross-appeal at 5. The evidence also refutes the District's statement that "there is no evidence that the District considered access to the Plaintiffs' property as being relevant when including the Von Holnstein property in ULID nos. 4 and 7." *Id.* at 43.

vice, because the plant had little capacity beyond what was necessary to serve current users and developers with vested rights. *Id.* at 922.

The court found "no basis for [the landowners'] claim that the City promised them priority in the event of shortage." *Id.* at 927. Distinguishing *Vine Street Commercial*, in which the court held that the municipality could not "retroactively impose conditions that effectively deprived property owners of the special benefits for which they had become obligated by assessments against their properties, after those assessments are paid in full" (*Vine Street Commercial*, 98 Wn. App. at 553), the *Funk* Court concluded that the landowners "are not being denied a right to connection until they satisfy a new condition. Rather, they are being made to wait until capacity becomes available." *Id.* at 927-28. The court further stated:

***There is no evidence of a promise*** to give priority in the event of a shortage to owners within the original ULID. At most, there is evidence that every property for which an assessment was paid was guaranteed a sewer hookup after the system was constructed, with no time limit on claiming the right to a hookup. This is not a promise that a hookup will be provided immediately on demand. It is not a promise to deny capacity to any residents who are ready to develop, in order to reserve capacity for residents who are not, and may never be, ready to develop.

*Id.* at 928-29 (emphasis added).

Here, by contrast, prior to forming ULID No. 7, the District made express promises that (1) property owners who paid their assessments were

guaranteed water hook-ups (CP at 156-57, 159, 807); and (2) the District would run "the water mains by the property making water available to them, this is also true for sewer"; that is, it was "the responsibility of the Utility District to deliver utilities to the boundary of the assessed properties." CP at 159, 167, 239-43, 807, 1419, 1422.

Also prior to forming ULID No. 7, the District made the following promises during a public discussion, which was attended by Kloss, the District's Commissioners, and certain affected landowners: "Superintendent Kloss then asked the Board that if the District is giving each lot owner one prepaid hookup, *does the system have the capacity to promise them water and will it be available.* The Board stated that *if the pass-wide system goes there will be enough capacity available . . .*" CP at 151 (Emphasis added).

Regarding Darlands' development plans for utilizing the 230 water hook-ups, at 400 gpd per day, and a corresponding number of sewer hook-ups, the District made express representations directly to Darlands, and indirectly to Kittitas County and WSDOT, that it has sufficient water capacity to allow Darlands to proceed with their planned unit development. CP at 1097-98 ("Concurrent with the issuance of the 192 additional sewer ERU connections the District will grant to [Darlands] a 'Certificate of Availability' . . . confirming the right and availability of the subject property to receive 230 water ERU and 230 sewer ERU connections . . . "); *see also*, WSDOT MAI

appraisal (CP at 777-79); District's letters to WSDOT (CP at 1418-1424).

**H. The District's Argument - That Darlands are Not Entitled to Recover the Money Paid to the District - is Without Merit.**<sup>28</sup>

The District begins its argument by mischaracterizing the nature of Darlands' case as being a collateral attack on the assessments that were levied under ULID Nos. 4 and 7. The fallacy with the District's argument has already been laid to rest. *See §A supra*. Another fallacy is the District's argument that "consideration *was* given for the assessments paid by Darland's predecessors, and the property *was* specially benefited by ULID nos. 4 and 7 in 1982 and 1987, respectively."<sup>29</sup> The facts and authorities set forth above soundly refute this argument. Unless water and sewer service is physically made available to the Darland Property, it has received no consideration in exchange for the paid assessments. *See, e.g.*, discussion at §G.1-3 *supra*.

The District has cited no authority to refute Darlands' position that, when they purchased the Property from Miller Shingle, they acquired all of Miller Shingle's rights in and to the Property that run with the land, as part of the "bundle of sticks" inherent in real property ownership. This bundle of

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<sup>28</sup> Although the District's focus is on ULID Nos. 4 and 7, there were two additional ULIDs under which the Property was assessed and paid for water and sewer service (ULID Nos. 3 and 8), both of which are also the subject of Darlands' request for reimbursement. CP at 1073 (ULID No. 3, in which assessments were assessed against Boise Cascade, Von Holnstein's predecessors-in-interest); CP 174, 537, 1429-30 (water assessments under ULID No. 8); *see also*, CP at 99, 109, 113.

<sup>29</sup> *See* District's cross-appeal at 29 (italics original).

sticks includes the District's legal and contractual obligations to make water and sewer service available to the Darland Property, so that it can connect to the District's water and sewer system. In fact, such rights were expressly granted in the deed pursuant to which Darlands purchased the Property from Miller Shingle. CP at 1556.<sup>30</sup>

The District's reliance on *City of Longview v. Longview Co.*, 21 Wn.2d 248, 150 P.2d 395 (1944) is misplaced. To begin with, the court made clear that its decision was limited to the particular "circumstances now confronting us." *Id.* at 253. The issue in that case was whether a landowner could obtain a refund of assessments, where "the total amount of the bonds issued in each district, together with the amount of assessments paid prior to their issuance, was in substantial excess of the cost of the improvement." *Id.* at 250-51. The *Longview* Court held that, ***because the bonds were still outstanding and had not been redeemed***, a refund was prohibited by statute. *Id.* at 253. Moreover, the court concluded its decision by holding that refunds of ***some of the assessments were in fact statutorily authorized***. *Id.* at 256.

Here, all of the District's water and sewer bonds were redeemed in

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<sup>30</sup> Darlands' opening brief cited *Dickman v. Commissioner*, 465 US 330, 336, 104 S.Ct. 1086 (1984); *Kiely v. Graves*, 173 Wn.2d 926, 936, 271 P.3d 226 (2012); *Manufactured Hous. Cmty of Wash. v. State*, 142 Wn.2d 347, 367, 13 P.3d 183 (2000) to support the argument that they are entitled to recoup all funds paid to the District under all of the ULIDs (not just ULID Nos. 4 and 7) for water and sewer service, as part of the rights inherent in real property ownership. The District fails to address these cases.

1992, fifteen years after the ULID No. 7 bonds were issued in 1987. CP at 1136; *see also*, CP at 157. This was 23 years after Darlands sought reimbursement for the undelivered water and sewer service, which was a claim they first raised on July 8, 2015. CP at 1108.

**I. The District's Remaining Arguments Are Baseless.**

**1. The District Will be Unjustly Enriched if it is Allowed to Keep the Money for Undeliverable Water and Sewer Service.**

The District's "no unjust enrichment" argument rests upon the following untenable premises: (1) nothing in the resolutions creating ULID Nos. 4 and 7 states that water and sewer trunk lines will be brought to the property lines of the assessed parcels; (2) the District never intended to extend the lines to the property parcels; (3) Washington law does not allow a refund of assessments; (4) Darlands and their predecessors failed to obtain the required access easements after the formation of the ULIDs to proceed with their development plans; and (5) Darlands' unjust enrichment claim is barred by the three year statute of limitations. The first three arguments have already been refuted. *See* discussion at §§C, D, G.2-5, and H *supra*.

The District's statute of limitations argument is also without merit. There is no evidence that anyone had a clue that the District would not honor its contractual obligations until July 18, 2001, when the District first announced that it would not fulfill its contractual promise to deliver the paid-for

water and sewer hook-ups to the Property. CP at 102, 122, 554, 736.

Darlands' complaint was filed on July 14, 2004, within three years of the District's breach. CP at 1. The claim for unjust enrichment was alleged in Darlands' first amended complaint, which was filed August 20, 2014. CP at 687.<sup>31</sup> Because the unjust enrichment claim relates back to the date the original complaint, it is not barred by the statute of limitations. *See Grant v. Morris*, 7 Wn. App. 134, 137, 498 P.2d 336 (1972) ("an amendment which changes only the legal theory of the action, or adds another claim arising out of the same transaction or occurrence, will relate back").<sup>32</sup>

## **2. The District's Reliance on the MOA is Self-Defeating.**

As with any contract, the law imputes into the MOA the implied covenant of good faith and fair dealing, which "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 112, 323 P.3d 1036

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<sup>31</sup> This lengthy delay was due to the parties' conditional settlement agreement, as reflected in the Memorandum of Understanding ("MOU"), entered on September 29, 2005, which stayed the litigation. CP at 593-97. During this time, Mr. Darland obtained conditional approval of a plat application to utilize 230 water and sewer hookups, in accordance with the MOA; and it was only after he exhausted all efforts to obtain the access easements that he exercised his option to rescind the MOA. CP at 729-30, 1096-1100.

<sup>32</sup> This same well-established rule of law applies equally to defeat the District's claim that Darlands' claim for breach of the implied covenant of good faith and fair dealing is barred by the three year statute of limitations. A comparison of the allegations of the original complaint with those of the first amended complaint confirm that Darlands' claims for unjust enrichment and breach of implied covenant of good faith and fair dealing are covered by the relation-back doctrine. Compare CP at 1-64 and CP at 687-701.

(2014). The *Rekhter* Court made clear that, henceforth, this duty creates a stand-alone cause of action, which can arise even when there is no breach of an express contract term. Thus, the District's argument - that the duty of good faith and fair dealing arises only in connection with the breach of an express contract term - is without merit.<sup>33</sup>

Under the MOA, the District was "responsible to act as the lead agency, with full cooperation of [Darlands], for purposes of obtaining all utility-related rights of way [and] easements", including, if necessary, by "exercis[ing] the power of eminent domain." CP at 1096. Darlands, on the other hand, were "responsible to act as the lead agency, **with full cooperation of the District as allowed by law**, for purposes of obtaining all easements and permits relating to obtaining a 60 foot (60') wide road access to the subject property." CP at 1097 (emphasis added). The District, however failed to exercise its power of eminent domain to obtain the utility easements, and it can point to nothing Darlands did to prevent it from doing so.

On the other hand, Mr. Darland exhausted all efforts to obtain the access easements, which he did not have the power to condemn for his development project. *Brown*, 97 Wn.2d at 370. And the District, which had such eminent domain power (*see* discussion, *supra*, at §F), took no action to con-

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<sup>33</sup> See District's cross-appeal at 37-38. Each case cited by the District was decided *before Rekhter*, and has thus been implicitly overruled by that case.

demn the access easement, just like it took no action to condemn the utility easements. It is the District, therefore, that breached the implied covenant of good faith and fair dealing. Although Mr. Darland was to act as the lead agency in obtaining the assess easements, it does not follow that this was his sole obligation. The MOA itself states that the District shall act in "full co-operation" with Darlands "for purposes of obtaining all [access] easements", which it did not do, thus violating its duty of good faith and faith and fair dealing. CP at 1097; *Rekhter*, 180 Wn.2d at 112.<sup>34</sup>

**3. The District's "Impossibility of Performance" Argument Misses the Mark.**

The District cites three inapposite authorities to support its argument that the doctrine of "impossibility of performance" is contrary to Washington law in this case: Restatement (Second) of Contracts §265 cmt. a (1981); *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wn.2d 558, 637 P.2d 647 (1981); and *Felt v. McCarthy*, 78 Wn. App. 362, 898 P.2d 315 (1995). Section 365 of the Restatement addresses the doctrine of "frustration of purpose", which the Comment makes clear is distinct from the doctrine of

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<sup>34</sup> The District's argument - that Darlands lack standing to assert a claim for breach of the implied covenant of good faith and fair dealing, because its duty was to Von Holnstein, not to any of his predecessors-in-interest - fails as a matter of law. The District cites no authority to support its argument. Arguments without citation to authority will not be considered on appeal. RAP 10.3(a)(6); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

"impossibility of performance." Similarly, the *Weyerhaeuser* case addressed the doctrine of commercial frustration which is likewise a different animal than the doctrine of impossibility of performance. *Weyerhaeuser Real Estate Co.*, 96 Wn.2d at 562, 566. Likewise, *Felt* dealt with the doctrine of supervening frustration, not impossibility of performance. 78 Wn. App. at 364-65. Simply put, the District fails to cite a single authority addressing the doctrine of impossibility of performance; nor does it address the facts and law supporting why the doctrine applies to support Darlands' alternative claim for reimbursement, as set forth in their opening brief.

**4. The District's Arguments on the Issues of Equitable and Promissory Estoppel Are Unpersuasive.**

The District cites no authority to support its argument that the doctrines of equitable and promissory estoppel do not apply in this case. The District's argument, therefore, should not be considered by the Court. *McKee*, 113 Wn.2d at 705. The thrust of the District's argument is its futile attempt to distinguish one of Darlands' authorities, *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968), which held: "The doctrine of equitable estoppel will be applied against [a water and sewer district] when acting in its governmental as well as when acting in its proprietary capacity, when necessary to prevent a manifest injustice and the exercise of its governmental powers will not be impaired thereby." *Id.* at 175.

The District argues *Finch* does not apply, because the District never intended to extend water and sewer service to the Property parcels, thus allowing them to connect to the District's water and sewer system. As already established, this argument is without merit. *See* discussion at §§C, D, F.1, and G.1 and .2 *supra*.

As for the promissory estoppel issue, the District acknowledges that Darlands have correctly stated the law; and the entire thrust of the District's argument is to simply shift the blame to Leclezio and Mr. Darland, as well as to its then-superintendent, Kloss. The District's blame Kloss argument has already been fully addressed. (*See* discussion at §D *supra*.)

Regarding blaming Leclezio and Darland, the District argues that Leclezio lied to Mr. Darland when Darlands purchased the Property on short-notice in 2003; therefore, Darlands failed to exercise due diligence in purchasing the Property, which thus exculpates the District from being liable for any claims by them. This argument is another obfuscating red herring. It completely disregards the fact that the District's statutory and contractual obligations run with the land, making them binding on the District as to all of Von Holnstein's successor-in-interest, including Darlands. *See, e.g., Looney*, 112 Wn.2d at 294-95. Because the District again fails to cite any authority to support its argument on this issue, it should be disregarded. *McKee*, 113 Wn.2d at 705.

Simply put, Leclezio's failure to disclose to Darland the fact that the District had reneged, in 2001, on its legal and contractual obligations to provide water and sewer service to the Property (*see* discussion, *supra*, at §§C and F.1 *inter alia*), this does not discharge those obligations. Regardless of what Leclezio failed to disclose to Darlands when they purchased the Property from Miller Shingle, the District's contractual and legal obligations to deliver the paid-for water and sewer service arose the moment Darlands asked the District to perform. *Vine Street Commercial*, 98 Wn. App. at 549-50, 553; *South Kitsap Family Worship Ctr v. Weir*, 135 Wn. App. 900, 909, 146 P.3d 935 (2006) (property rights that transfer with title include all conveyable rights unless otherwise expressly reserved); *see also*, CP at 115 (Miller Shingle's deed to Darlands conveying all "utilities, including [the District's] water and sewer hook-ups").

Finally, the District fails to point out that, as part of his due diligence, Mr. Darland, on June 4, 2003, seven days before Miller Shingle signed off on the deed conveying the Property to Darlands, reviewed numerous documents concerning the status of the Property, which obviously did not support Leclezio's non-disclosures; otherwise, Darlands would not have purchased the Property. CP at 1908-09, 1913. And Darlands did not become aware of the District's intent to breach its legal and contractual duties until the District informed Mr. Darland of this fact shortly after Darlands purchased the Prop-

erty. CP at 1911.

## II. CONCLUSION

The District's cross-appeal misses the mark. Darlands are not challenging the validity or the amount of the assessments levied under ULID Nos. 4 and 7. To the contrary, Darlands want the benefit of those assessments to develop their Property to utilize the guaranteed water and sewer hook-ups, which the District promised it would deliver upon payment of the assessments. Darlands are thus claiming the District breached its legal and contractual duty to make the paid-for water and sewer service physically available to Darlands' Property. The District's cross-appeal is riddled with inapposite legal authorities and unpersuasive arguments, none of which suffice to reverse trial court Judge Cooper's order denying the District's summary judgment motion, or to overcome Darlands' arguments for reversing trial court Judge Sparks' subsequent summary judgment orders. Accordingly, the former should be upheld and the latter reversed.

DATED this 27 day of June, 2016.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,  
SLOTHOWER & DENISON, LLP

By: 

Douglas W. Nicholson, WSBA #24854  
Attorney for Appellants  
Michael L. Darland and Myrna Darland

**CERTIFICATE OF SERVICE**

I certify that on the 21<sup>st</sup> day of June, 2016, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

Attorneys for Defendant/Cross-Appellant:

Daniel Mallove

Scott Sawyer

Attorneys at Law

2003 Western Ave., Ste. 400

Seattle WA 98121-2142

Via First-Class Mail



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Kimberly Bailes